

SERVICE DATE - JANUARY 29, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42057

PUBLIC SERVICE COMPANY OF COLORADO D/B/A XCEL ENERGY
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

MOTION FOR PROTECTIVE ORDER

Decided: January 26, 2001

In a verified complaint filed, and served on defendant The Burlington Northern and Santa Fe Railway Company (BNSF), on December 20, 2000, the Public Service Company of Colorado d/b/a Xcel Energy, Inc. (Xcel) alleges that the rates to be assessed by BNSF on complainant's movements of coal from origins in the Powder River Basin (PRB) of Wyoming to Xcel's Pawnee Steam Electric Generating Station (Pawnee) near Brush, CO, will exceed a maximum reasonable level.¹ Xcel alleges that BNSF possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed along with other relief.² Xcel also requests an award of reparations equal to all amounts paid to BNSF for service to Pawnee in excess of maximum reasonable levels beginning January 1, 2001, plus interest.

By motion filed January 9, 2001, Xcel seeks a protective order with respect to evidentiary submissions and in aid of discovery. Xcel presents a proposed order, drafted with advice from BNSF. The proposed order, as modified and set out in the appendix, is consistent with the protective orders entered by the Board in recent rate proceedings.³ It includes provisions governing the production of highly confidential material and stipulates that the protected exchange of material will not constitute an unauthorized disclosure, or result in criminal penalties, under 49 U.S.C. 11904.

¹ The service was provided by BNSF under a rail transportation contract that expired on December 31, 2000. As of January 1, 2001, the applicable rate is a trainload rate for movements in cars supplied by Xcel (Common Carrier Pricing Authority BNSF-90043).

² Xcel seeks to prescribe a common carrier rate for BNSF's rail transportation between the PRB mine origins and Xcel's Pawnee facility.

³ See Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056 (STB served Nov. 13, 2000) and cases cited therein.

In response to Xcel's proposed protective order, BNSF filed a motion for modification with the Board on January 16, 2001. With the stated purpose of facilitating the exchange and preparation of evidence, it seeks to include in the text of the protective order the following paragraph:

Each party has a right to view its own data, information and documentation, even if that data, information and documentation has been designated as "HIGHLY CONFIDENTIAL" by a producing party, without securing prior permission from the producing party. In addition, to ensure that each party can respond to evidence filed by the other party with appropriate input from the party's in-house counsel and employees, the parties shall cooperate as necessary to redact or otherwise identify portions of evidence filed as "HIGHLY CONFIDENTIAL" so that redacted versions of evidence can be disclosed to a party's in-house counsel and employees.

Xcel replied to BNSF's motion for modification on January 19, 2001, arguing that the formal imposition by the Board of a requirement for the parties to cooperate is both unnecessary and contrary to Board precedent. Citing its assurances to BNSF that it will try to accommodate BNSF's needs regarding the redaction and identification of Highly Confidential materials, as well as the Board's reluctance to "create a new responsibility, not currently provided in the agency's rules, under the protective order,"⁴ Xcel contends that the modifications to its proposed protective order should not be included in the document's final text.

We agree that BNSF's modifications of the proposed protective order are not entirely acceptable. Although there is good cause to grant the motion for protective order, including the portion of the suggested modification regarding the parties' right to view their own data,⁵ the protective order will be granted without the additional obligation to cooperate that comprises the remainder of the above paragraph. The obligation to redact and identify portions of evidence filed as Highly Confidential pertains to allocation of the burdens of litigation, not to an issue properly managed by the Board. Under the FMC Wyoming decision, the allocation of litigation burdens would be better determined after pleadings have been filed and each party can evaluate the use of the Highly Confidential designation, and challenge any designation it deems unreasonable.

⁴ FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, STB Finance Docket No. 42022 (STB served Jan. 8, 1999) (FMC Wyoming).

⁵ That portion of the modification has been appended to paragraph 2 of the protective order.

Good cause exists to grant the motion for protective order. The unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury. Issuance of the requested protective order will ensure that the material produced, in response to a discovery request or otherwise, will be used only in connection with this proceeding and not for any other business or commercial purpose. The motion, as outlined by the Board, conforms with the Board's rules at 49 CFR 1104.14 governing requests for protective orders to maintain confidentiality of materials submitted to the Board and the rules at 49 CFR 1114.21(c) for a protective order regarding discovery. Accordingly, the motion for protective order will be granted.

On January 8, 2001, Xcel filed a report on the parties' conference, held pursuant to 49 CFR 1111.10(b). The parties have agreed to a procedural schedule with time frames extended from those established in 49 CFR 1111.8 to lessen the burden of compliance on their personnel. The revised procedural schedule is set out below.

It is ordered:

1. Complainant Xcel's motion for protective order is granted.
2. The parties are directed to comply with the protective order in the appendix to this decision.
3. The revised procedural schedule in this proceeding is as follows:

April 2, 2001	End of discovery period.
May 17, 2001	Opening evidence due.
July 23, 2001	Reply evidence due.
September 5, 2001	Rebuttal evidence due.
4. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, that the party believes in good faith reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:

(a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.

(b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.

(c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising therefrom. However, outside counsel (but not outside consultants) for a party are permitted to retain file copies of all pleadings and evidence filed with the Board as well as work product.

(d) If contained in any pleadings filed with the Board, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board or any administrative law judge presiding in this proceeding. Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the attached Undertaking for Highly Confidential Material prior to receiving access to

such materials. However, each party has a right to view its own data, information and documentation, even if the data, information and documentation have been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the producing party or executing the undertaking. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order including without limitation paragraph 1.

3. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to stamp the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.

4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

5. If any party intends to use material designated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” at hearings in this proceeding, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to any Administrative Law Judge, the Board, or the court with a written request that the Judge, the Board, or the court: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

6. If any party intends to use material designated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material is used shall be

restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that include or disclose such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” materials shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

7. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904.

8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by the other party, or copies or notes thereof, as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of receipt of actual notice of the release order or within 3 working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released or within 3 working days prior to such release, whichever is soonest, to permit the producing party to contest the release.

9. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by an Administrative Law Judge decision from which no appeal is taken or by the Board, warrants suspension of any of the provisions herein.

10. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.

11. A “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” designation may be removed by agreement of the parties, or, absent such agreement, by appropriate Board order, upon application of a party seeking to remove such designation, where there is a failure by the party seeking to preserve confidentiality to demonstrate that the material is properly deemed “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” as defined herein.

**UNDERTAKING
CONFIDENTIAL MATERIAL**

I, _____, have read the Protective Order served on January 29, 2001, governing the production of confidential documents in STB Docket No. 42057, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. 42057 or any judicial review proceeding arising therefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of pleadings filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____

**UNDERTAKING
HIGHLY CONFIDENTIAL MATERIAL**

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on January 29, 2001, governing the production of confidential documents in STB Docket No. 42057, understand the same, and agree to be bound by its terms. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising therefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____